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No. 84-158

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROCKY B FISHERIES, INC., JOHNNY BROWN and DAVID BROWN, Appellants,

v.

NORTH BEND FABRICATION & MACHINE, INC., JOHN DUDREY with his law firm partners FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. McCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN, Appellees.

ON APPEAL FROM THE

OREGON COURT OF APPEALS

APPELLEES' MOTION TO DISMISS OR AFFIRM

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LIST OF PARTIES

The caption contains the list of all parties to the proceedings. Appellee North Bend Fabrication & Machine, Inc. has no parent company, subsidiaries or affiliates.

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ON APPEAL FROM THE
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APPELLEES' MOTION
TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, Rules of the Supreme Court of the United States, appellees move the court for an order dismissing the appeal herein or affirming the judgment of the Oregon Court of Appeals on the grounds that the case raises no substantial federal question requiring further argument.

QUESTION PRESENTED

Neither the decision below nor the record raises the question which appellants present in their Jurisdictional Statement. Appellants ask, rhetorically, whether an Oregon statute which permits summary, ex parte, prejudgment seizure of a vessel "without any (a) pre-seizure notice; (b) pre-seizure hearing; (c) extraordinary situations existing; (d) a writ being issued by a judge; (e) sworn affidavits of the claimant; (f) post-seizure hearings; or (g) adequate bond being posted" violates rights secured by the Fourteenth Amendment to the United States Constitution. (Jurisdictional Statement, p. i.) The Oregon Court of Appeals did not decide that question, however. Moreover, the record will not support a determination of that question by this Court.

Appellants contended in the trial court that appellees are liable under

42 U.S.C. §1983.[1] Like the trial court, the Oregon Court of Appeals held that appellants could not state a §1983 claim because the procedural safeguards observed in the seizure of the Rocky B satisfied the requirements of due process.

The following safeguards were observed: (1) a judge authorized the seizure after reviewing specific allegations setting forth the basis of North Bend's claim of lien under Oregon's vessel lien law; (2) the seizure gave the appellants immediate and actual notice of the need to defend their interests in the vessel; (3) the appellants had an opportunity for a prompt post-seizure

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[1]Appellants also contended that appellees are liable under various common law theories. Since appellants' common law contentions raise questions of state law only, they are not involved in this appeal. This appeal is limited to issues raised by the judgment of the Oregon Court of Appeals' affirming the trial court's dismissal of appellants' §1983 claim.

hearing to challenge the validity of the underlying claim and of the seizure but did not avail themselves of it; and (4) the appellants could have obtained discharge of the vessel by posting adequate security with the court, but they did not do so.

The only question presented by this appeal is whether a seizure accomplished with these safeguards deprived appellants of property without due process.[2] This question is readily answered on the basis of previous decisions of this Court. Therefore, the case does not involve a substantial federal question which requires further argument.

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[2]North Bend acted under color of state law by bringing an action in which a state official, the sheriff, seized the vessel. *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed.2d 482 (1982).

ARGUMENT

1. Factual Statement.[3]

The appellants Brown contracted with Charleston Marine Works, Inc. to build a fishing vessel, the Rocky B, in May, 1979. Construction was financed by the Southern Oregon Production Credit Association (PCA), which secured its loan with what appellants characterize as a "preferred ship's mortgage." The Rocky B was launched, documented and licensed in November, 1979. A month later, the Browns transferred their interest in the vessel to appellant Rocky B Fisheries, Inc., a corporation in which the Browns were shareholders and directors and which employed them.

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[3]This statement of facts is drawn from the pleadings in the underlying action against the vessel, reproduced as Appendices A, B and C hereto; the complaint in this action, reproduced as Appendix D hereto; and the opinion of the Oregon Court of Appeals, *Rocky B Fisheries v. No. Bend Fab.*, 66 Or. App. 625, 627-28, 676 P.2d 319, *rev. denied* 297 Or. 82 (1984), appended to the Jurisdictional Statement, A-3 to A-5.

Appellee North Bend supplied services, equipment and materials on an open account for the construction, outfitting and equipping of the vessel at the request of the contractor and Johnny Brown. Some of these were supplied before the vessel was launched and licensed, and some afterward. An outstanding balance of $5,410.04 was due when North Bend claimed a non-maritime lien on the vessel in that amount pursuant to Or. Rev. Stat. 783.010.

On August 1, 1980, North Bend filed an action against the Rocky B by name in the circuit court of the county where it was located. (Complaint, App-1 to App-5.) The complaint sought judgment against the vessel for the amount due. North Bend moved for an order directing the clerk of the court to issue a warrant for the seizure of the vessel. In an ex parte proceeding, a circuit court judge reviewed the facts set forth in the complaint,

required North Bend to post a bond to indemnify the sheriff against wrongful seizure, and ordered the clerk to issue a warrant and the county sheriff to seize the vessel pursuant thereto. (Order for Warrant for Seizure of Boat or Vessel, App-6 to App-7.)

The sheriff executed the warrant and seized the vessel. Neither the complaint, the order nor the warrant was served on the appellants before the seizure. Nonetheless, the appellants learned of the seizure immediately and demanded release of the vessel. The sheriff did not release it. None of the appellants sought an order discharging the vessel from the court's custody or otherwise made an appearance in the pending vessel lien action.

PCA commenced an action in the United States District Court of the State of Oregon to foreclose its mortgage. The marshall, acting pursuant to an order of

that court, seized the vessel from the sheriff and was holding it under arrest when appellants commenced this action against North Bend and its attorneys for damages resulting from the seizure of the vessel.

In this action, appellants claim that appellees are liable under 42 U.S.C. §1983 on the grounds that the seizure deprived them of property without due process of law. The trial court granted North Bend's motion for summary judgment and the individual appellees' motion to dismiss. The Oregon Court of Appeals affirmed, and the Supreme Court of Oregon did not grant review.

2. Oregon's Vessel Lien Law.

Or. Rev. Stat. 783.010 makes a vessel constructed in this state liable for debts incurred in furnishing materials and labor for its construction, outfitting and equipping. It subjects the vessel to a

lien for such debts. Or. Rev. Stat. 783.010(2).[4]

The lien is enforceable by an action in rem which the creditor may bring against the vessel by name. Or. Rev. Stat. 783.030. The action is commenced by filing a complaint in the circuit court of the county where the vessel is located. Or. Rev. Stat. 783.040. The complaint must set forth the creditor's demand in all its particulars and on whose account the demand

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[4]Or. Rev. Stat. 783.010(2) provides, in pertinent part:

> "Every boat or vessel . . . constructed in this state is liable and subject to a lien:
>
> ". . . (2) For all debts due to persons by virtue of contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors or subcontractors of such owners, . . . to construct . . . such boat or vessel, on account of labor done or materials furnished by mechanics, tradesmen or others in the building, . . . fitting and . . . equipping such boat or vessel . . . ."

accrued, and it must be verified by the plaintiff or some credible person for him. Or. Rev. Stat. 783.040.

Or. Rev. Stat. 783.050 provides that the clerk of the court *shall* issue a warrant commanding the sheriff to seize the vessel. Once the warrant is returned, the action may proceed in the circuit court against the vessel in the same manner as if the action had been commenced against the debtor. Or. Rev. Stat. 783.060.

The owner, master, agent or consignee of the vessel may appear on its behalf and answer the complaint. Or. Rev. Stat. 783.070. If no appearance is made, however, the plaintiff may obtain a default judgment against the vessel. Or. Rev. Stat. 783.080.

The owner, master, agent or consignee may have the vessel released before the underlying claim is adjudicated by filing an undertaking in favor of the creditor

with security in an amount to be approved by the judge or clerk of the court. Or. Rev. Stat. 783.090. If such an undertaking is filed, a judgment against the vessel will be entered against the undertaking. Or. Rev. Stat. 783.120. If one is not filed, the vessel will be sold to satisfy a judgment against it. Or. Rev. Stat. 783.110.

The Oregon Court of Appeals has construed Or. Rev. Stat. 783.090 to provide an opportunity to the owner for an early post-seizure hearing ". . . to challenge the legality of the seizure, the validity of the claim, or the amount claimed . . . ." *Rocky B Fisheries v. No. Bend Fab., supra*, 66 Or. App. at 633-34,

Appendix to the Jurisdictional Statement, A-22 to A-23.[5]

At such a hearing, the owner may move to dismiss the action for lack of subject matter jurisdiction and lack of jurisdiction over the vessel pursuant to Or. R. Civ. P. 21A upon the grounds that the seizure is invalid. If the pleadings do not apprise the court of the relevant facts, the moving party may ask the court to require the creditor to show cause why the court has jurisdiction. Or. R. Civ. P. 21A. It is incumbent upon the creditor to sustain the court's jurisdiction in the face of such a challenge. Therefore, Oregon's vessel lien law in conjunction with its rules of procedure gives the owner

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[5]This Court is bound by the state court's construction of a state statute. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688, 79 S. Ct. 1362, 1365, 3 L. Ed. 2d 1512 (1959); *Guaranty Trust v. Blodgett*, 287 U.S. 509, 513, 53 S. Ct. 244, 245, 77 L. Ed. 463 (1933). Therefore, in determining the constitutionality of a state statute, the Court must test it as construed by the state appellate court.

of the seized vessel an opportunity for a prompt post-seizure hearing on the merits of the underlying claim and the validity of the seizure.

3. Appellants Were Accorded the Procedural Safeguards Due Them Under the 14th Amendment.

Seizure of the vessel was accomplished with constitutionally adequate procedural safeguards. Appellants contended before the trial court that they were denied due process because the seizure was authorized even though North Bend did not submit an affidavit of probable cause or an adequate bond to protect appellants' interest in the vessel; appellants did not receive preseizure notice or were not given an opportunity to present affidavits of evidence to the court; and no facts were presented to the court that the Rocky B was in danger of destruction, harm, concealment or transfer. (Complaint, ¶ XIV, App.-16 to

App.-17.) This Court has never held that each of the preceding safeguards is required in every case of prejudgment seizure of property, and the law is to the contrary.

Procedural due process is not meant to protect persons from deprivation of life, liberty or property but from their *mistaken* or *unjustified* deprivation. *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972). Thus, in deciding what procedural safeguards are required by the Constitution in various contexts, the Court has repeatedly emphasized that the rules of procedural due process are shaped by the risk of error inherent in the truth-finding process. Such rules are meant to minimize substantively unfair or mistaken deprivations of life, liberty or property by enabling persons to contest the basis upon which a state proposes to deprive them of protected

interests. *Carey v. Piphus*, 435 U.S. 247, 259-60, 98 S. Ct. 1042, 1050, 55 L. Ed. 2d 252 (1978).

Furthermore, the due process clause does not embody any single model of procedural fairness or require a particular form of procedure that must be followed before a state may interfere with a protected interest.

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' *Inland Empire Council v. Millis*, 325 U.S. 697, 710, 65 S. Ct. 1316, 1323, 89 L. Ed. 1877 (1945). Due process of law guarantees 'no particular form of procedure; it protects substantial rights.' *NLRB v. Mackay Co.*, 304 U.S. 333, 351, 58 S. Ct. 904, 913, 82 L. Ed. 1381 (1938). 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961); *Stanley v. Illinois*, 405 U.S. 645, 650, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972)." *Mitchell v. W. T. Grant Company*, 416 U.S. 600, 610, 94 S. Ct.

1895, 1901, 40 L. Ed. 2d 406 (1974) (White, J.).

Justice Frankfurter wrote in *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63, 71 S. Ct. 624, 643-64, 95 L. Ed. 817 (1951) (concurring):

> "'Due process' is compounded of history, reason [and] the past course of decisions . . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment and escapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.
> . . . .
>
> "The Court has responded to the infinite variety of perplexity and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another."

Recent decisions of the Court demonstrate these principles. In *Sniadach v. Family Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969), *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113

(1971), *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975), an established state procedure authorized the deprivation of property, and the Court held that due process required predeprivation notice and hearing in order to minimize the possibility that a wrongful deprivation would occur.

The Court has recognized, however, that post-deprivation remedies, if available under state law, can satisfy the due process clause. Referring to several of the Court's earlier decisions, Justice Rehnquist, in *Parratt v. Taylor*, 451 U.S. 527, 538-39, 101 S. Ct. 1908, 1914-15, 68 L. Ed. 2d. 420 (1981), wrote:

> ". . . . In such cases, the normal predeprivation notice and opportunity to be heard is pre-termitted if the State provides a postdeprivation remedy . . . . These cases recognize that either

the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." [Citations and footnotes omitted.]

In *Mitchell*, the Court had stated:

"Petitioner asserts that his right to a hearing before his possession is in any way disturbed is nonetheless mandated by a long line of cases in this Court, culminating in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969), and *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). The pre-*Sniadach* cases are said by petitioner to hold that 'the opportunity to be heard must precede any actual deprivation of private property.' Their import, however, is not so clear as petitioner would have it: they merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial

> enquiry is not denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' *Phillips v. Commissioner*, 283 U.S. 589, 596-597, 51 S. Ct. 608, 611, 75 L. Ed. 1289 (1931)." 416 U.S. at 611, 94 S. Ct. at 1902. [Footnote omitted.]

After quoting the foregoing passage,

Justice Rehnquist continued:

> "Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965). However, . . . we have rejected the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any preseizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available." *Parratt v. Taylor, supra*, 451 U.S. at 540-41, 101 S. Ct. at 1915-16 [Footnote omitted.]

Thus, due process does not require a preseizure hearing where an adequate and timely post-seizure hearing is available under state law.

Nor is preseizure notice always required. The right to notice is inseparable from the right to a hearing. As Justice Jackson observed, the right to be heard

> ". . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 965 (1950).

The timing and the form of notice may vary from case to case, however.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such a nature as reasonably to convey the

> required information . . . and it must afford a reasonable time for those interested to make their appearance . . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied . . . .
>
> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or, when conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Id.* at 314-15, 70 S. Ct. at 657-58.

Thus, notice which is reasonably certain to inform those affected that their interests in the property are at risk and which is given early enough to permit them to defend their interests is constitutionally adequate if the practicalities and

peculiarities of the case prohibit preseizure notice.

The question remains, however, whether notice and a hearing are required by the due process clause before a vessel may be seized under Oregon's vessel lien law and, if not, whether the post-seizure hearing permitted by Oregon law is constitutionally adequate. To answer this question, the Court must not only examine the procedural safeguards with which this particular seizure was accomplished, but also recall that Oregon law gives a creditor such as North Bend an interest in the newly constructed vessel.

A vessel constructed in Oregon is subject to a lien in favor of one who supplies materials and services in its construction, outfitting and equipping. Or. Rev. Stat. 783.020(2). The vessel itself is viewed as the obligor, whether or not the owner is also obligated. The

creditor's rights are limited to the value of the vessel and depend upon its presence within the state. Under Oregon law, the lien is a property interest in the vessel, and seizure is the means by which it is perfected. *Paddack v. Rasmussen*, 294 Or. 599, 602, 660 P.2d 677 (1983). Therefore, Oregon law gives a creditor who has supplied services and materials in the construction, equipping and outfitting of a vessel an interest in it sufficient to permit the vessel to be detained and ultimately subjected to sale for satisfaction of the debt.

The creditor's interest vanishes with the vessel, however. Unless the vessel is seized and brought within the court's custody, the creditor acquires no lien. *Paddack v. Rasmussen, supra*.

In *Paddack*, the trustees of a union trust fund informed the vessel owners'

attorney that they claimed a lien on the vessel for contributions due the fund for labor expended by union members in the vessel's construction. Plaintiffs then filed suit against the vessel and its owners to foreclose a vessel construction lien under Or. Rev. Stat. 783.010. Before the owners were served or the vessel seized, the owners had the vessel towed to a Washington shipyard for completion of construction. The action against the vessel was subsequently dismissed for lack of jurisdiction. Plaintiffs then brought a second action against the owners to recover damages for wrongful removal of the vessel. The Supreme Court of Oregon affirmed dismissal of the wrongful removal action on the ground that, since the vessel had not been seized, plaintiffs had never acquired a lien or any other interest in it that would support a claim for wrongful removal. 294 Or. at 604-605.

Because the action against the vessel is a proceeding in rem and the lien is not perfected unless the vessel is seized, seizure is necessary to give the state court jurisdiction of the defendant and power to proceed with the lien enforcement action.

> "'"The proceeding, therefore, is strictly and technically *in rem*; it is pursued without reference to the owner, to enforce a liability which the thing itself has incurred, and the thing is condemned to make reparation. ***Possession is the essential element upon which the jurisdiction of the court depends***; and as this possession is deemed that of the sovereignty under whose authority the court sits, if any question can be regarded as settled by the unanimous opinion of courts and jurists it is this, that the 'law regards the seizure of the thing as constructive notice to the whole world'" . . .'." *Paddack v. Rasmussen, supra*, 294 Or. at 604 [citing *Cordrey v. Steamship "Bee"*, 102 Or. 636, 651, 201 P. 202, 20 A.L.R. 1079 (1922), and quoting from *Keating v. Spink*, 3 Ohio St. 105, 62 A.D. 214 (1853)]. [Emphasis added.]

Therefore, swift and sure process must be available to secure the vessel to protect the creditor's interest and to enable the state court to acquire jurisdiction over the defendant and the action.

These facts are sufficient to distinguish seizure of a vessel under Oregon's vessel lien law from prejudgment attachment of a debtor's property in a creditor's action against the debtor who owns the attached property, as in *Sniadach* and *Fuentes*. The lien created by Oregon law gives the creditor an interest in the vessel which is perfected only by seizure. Prejudgment attachment does not create an interest in the attached property, but only secures it for eventual satisfaction of any judgment entered in favor of the attaching party. Furthermore, arrest of the vessel is necessary under Oregon law to give the court jurisdiction over the vessel and power to enter a judgment against it. By

contrast, prejudgment attachment presupposes that the court has personal jurisdiction of the owner of the attached property. As the Court of Appeals correctly observed, these differences do not immunize the procedure for arresting a vessel from the constraints of due process. They do, however, shape the analysis of what process is due.

Oregon's vessel lien law provides the following procedural safeguards:

(a) Before a vessel may be seized, the creditor must file a complaint that sets forth his demands in all its particulars, identifies the person on whose account the demand accrued, and is verified by the plaintiff or some credible person. Or. Rev. Stat. 783.040.

In the present case, the complaint set forth the details of North Bend's claim against the Rocky B. (App-1 to App-5.) It

alleged particulars about the ownership and construction of the Rocky B, that North Bend performed labor and furnished material for its construction, outfitting and equipping at the request of the boat builder and agents of the owner, that it received partial payment for its services, and that an unpaid balance remained due. In light of these details, appellants' assertion that the complaint contained only conclusory allegations is inaccurate.

The complaint was signed by North Bend's attorney, but not verified. Under Oregon law, the signature of an attorney on a pleading constitutes certification that the allegations are true to the best information, belief and knowledge of the attorney. Or. R. Civ. P. 17A. Judicial authorization of the seizure on the basis of certified allegations in the complaint was sufficient to overcome the lack of

verification, however. Its absence did not deprive appellants of due process.

(b) Although Oregon law requires the clerk of the court to issue an order to arrest the named vessel when a complaint is filed against it, Or. Rev. Stat. 783.050, in this case North Bend and its attorneys obtained judicial authorization of the seizure. Therefore, the exercise of the state's seizure power was subject to judicial control from the outset. Judicial participation in state-authorized seizures of property was a major factor leading the court to sustain Louisiana's sequestration statute. *Mitchell v. W. T. Grant Company, supra*, 416 U.S. at 615, 94 S. Ct. at 1904.

(c) The owner of the vessel was not given notice prior to its seizure. However, measured by the principles set forth in *Mullane v. Central Hanover Bank & Trust Co., supra*, preseizure notice is not required because seizure itself provides

constitutionally adequate notice in light of the interests served by the statute and the practical realities of the situation.

As *Paddack v. Rasmussen, supra,* illustrates so well, preseizure notice enables the owner to frustrate judicial enforcement of the lien by simply putting the vessel out to sea. The situation is thus substantially similar to the one that was before the Court in *Mitchell,* where it stated:

> ". . . There is the real risk that the buyer, with possession and power over the goods, will conceal or transfer the merchandise to the damage of the seller. This is one of the considerations weighed in the balance by the Louisiana law in permitting initial sequestration of the property. An important factor in this connection is that *under Louisiana law, the vendor's lien expires if the buyer transfers possession.* It follows that if the vendor is to retain his lien, superior to the rights of other creditors, it is imperative when default occurs that the property be sequestered in order to foreclose the possibility that the buyer will sell or otherwise convey the

> property to those parties against whom the vendor's lien will not survive. *The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the debtor acting in bad faith.*" 416 U.S. at 609, 94 S. Ct. 1900-1901. [Emphasis added.]

That seizure is reasonably calculated to put the owner or master of the vessel on notice that the owner's interest is at risk is readily demonstrated by the facts of this case. Appellants concede that *immediately* after the seizure, they requested release of the vessel. (Complaint, ¶ VIII, App-14.) It cannot be doubted, therefore, that the seizure gave appellants reasonable, and hence constitutionally

adequate, notice, calling upon them to defend.[6]

The seizure of the Rocky B served the ends sought by state law. It provided immediate and actual notice to the owner of

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[6]In *The Mary*, 9 Cranch, 126, 144, 3 L. Ed. 678 (1815), Chief Justice Marshall said:

> "It is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served upon the thing itself. *This is necessarily notice to all those who have any interest in the thing, and is reasonable, because it is necessary*, and because it is the part of common prudence for all those who have any interest to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to The Mary, has constructive notice of her seizure and may fairly be considered as a party to the libel." [Emphasis added.]

the need to defend its interests in the Rocky B, it safeguarded the interests of the creditor, and it conferred jurisdiction upon the court. Preseizure notice serves only the first of these ends and can readily frustrate the others. Therefore, it is no more required here than it was in *Mitchell*.

(d) Oregon's vessel lien law permits the owner to obtain discharge of the vessel by posting sufficient security with the court. As construed by the Oregon Court of Appeals, it also provides the owner with a prompt post-seizure hearing to challenge the legality of the seizure and the validity and the amount of the claim. The owner can thus cut to a minimum the time of court-supervised possession and of loss of use of the vessel. Appellants here did not avail themselves of this opportunity, so their argument on the severity of the deprivation does not carry much weight.

Appellants complain that they could not have known of this opportunity until after the Court of Appeals had construed the statute in this case. (Jurisdictional Statement 25, n. 8.) This complaint ignores Or. Rev. Stat. 783.070. That statute expressly authorizes the master, owner, agent or consignee to appear in the action on behalf of the vessel. Under Oregon's rules of civil procedure, the person who appears on behalf of the vessel may challenge the court's jurisdiction of the defendant and its jurisdiction of the action before answering the complaint. Or. R. Civ. P. 21A. If the seizure is unconstitutional, it is invalid and the vessel must be released. That, of course, destroys the court's jurisdiction. Therefore, Or. Rev. Stat. 783.070, together with Oregon's rules of civil procedure, clearly afforded appellants an opportunity for a prompt post-seizure hearing had they chosen

to avail themselves of it. The opportunity existed under state law when the vessel was seized; it did not spring into existence with the Court of Appeals' construction of Or. Rev. Stat. 783.090, a different statutory provision.

Appellants suggest that the outcome of such a hearing would have been controlled by the fact that the materials and services for which the lien arose were provided after the vessel was launched, documented and licensed. (Jurisdictional Statement 25-26.) According to appellants, Oregon has no authority to seize a vessel for materials and supplies provided to an already constructed and seagoing vessel because such a lien is not a non-maritime lien, but a maritime lien subject to exclusive federal admiralty jurisdiction.

Appellants misunderstand the legal standards for determining where state jurisdiction of a non-maritime lien ends

and admiralty jurisdiction of a maritime lien begins. They mistakenly look upon the launching, documenting and licensing of the vessel as the events marking the line between the domains of state and federal jurisdiction. This focus obscures the fact that construction of a vessel includes all work necessary to put the vessel into the service for which it is intended, including any outfitting or equipping that may be needed after the vessel is launched and even documented. Constructing, launching, outfitting and documenting are all steps towards placing a vessel into service. State power does not automatically end and admiralty jurisdiction begin upon the completion of any one, or even all, of them.

The relevant question is whether the work for which the lien is claimed was necessary to bring the vessel into condition to function as intended. *Thames*

Towboat Co. v. The Francis McDonald, 254 U.S. 242, 245, 41 S. Ct. 65, 66, 65 L. Ed. 245 (1920); *Iroquois Transp. Co. v. De Laney F. & I. Co.*, 205 U.S. 354, 363-64, 27 S. Ct. 509, 512-13, 51 L. Ed. 836 (1906). Liens for labor and materials that are supplied in the construction, equipping and outfitting of a vessel and that are necessary to bring the vessel into condition to function as intended may be regulated by state law even after the vessel is launched and licensed, and they may be enforced by state courts even though a voyage is thereby interrupted and commerce hampered. *Iroquois Transp. Co. v. De Laney F. & I. Co., supra*.

In any event, North Bend moved for summary judgment as to the nature of its lien. The trial court denied that motion, finding that a material factual dispute required a trial. The nature of North Bend's lien remains to be resolved at

trial. Hence it is not an issue in this appeal.

CONCLUSION

The only question presented in this appeal is whether seizure of the Rocky B deprived the appellants of property without due process of law. The procedural safeguards provided by Oregon law, when examined in light of the interests protected and the objectives served by its vessel lien statute and when measured by the standards of *Mullane* and *Mitchell*, are a constitutional accommodation of the respective interests of vessel owners and creditors holding vessel construction liens. The seizure of the Rocky B observed those safeguards. Indeed, it even surpassed them in that the seizure was authorized by a judicial officer rather than the clerk of the court. It did not deprive appellants of property without due process of law. There is, therefore, no

substantial federal question presented by this case which requires further argument. The appeal should be dismissed or the judgment below summarily affirmed.

DATED this 20th day of August, 1984.

Respectfully submitted,

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS

/s/ J.P. GRAFF

By: _____
J. P. Graff*
Of Attorneys for
Appellants

*Counsel of Record

APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF COOS

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation, Plaintiff, vs. ROCKY B., a boat newly constructed in the State of Oregon, Defendant.	Case No. COMPLAINT

Plaintiff alleges:

I

At all material times mentioned herein, Plaintiff is now and has been an Oregon corporation.

II

The ROCKY B. is a newly constructed boat which was made and constructed in or near the City of Charleston, State of Oregon.

III

That at all material times mentioned herein, prior to the transfer of ownership to Rocky B. Fisheries, Inc., Johnny O. Brown and Dave Brown were the owners of said boat, ROCKY B. During the month of December, 1979, Johnny O. Brown and Dave Brown transferred ownership of said boat to Rocky B. Fisheries, Inc., an Oregon corporation, who at all times mentioned herein, subsequent to the date of said transfer of ownership from Johnny O. Brown and Dave Brown, has been and is now the owner of said boat, ROCKY B.

IV

That at all material times mentioned herein, Charleston Marine Works, Inc., an Oregon corporation, was a contractor employed by the above said owners of said boat during each of said owners' respective ownership of said boat for the building,

fitting, furnishing and equipping of said boat.

V

At all material times mentioned herein, Johnny O. Brown was the owner of said boat or an agent of Rocky B. Fisheries, Inc. during its ownership of said boat.

VI

That from December 13, 1979 to May 6, 1980, Plaintiff performed labor and furnished materials for the construction, fitting, furnishing and equipping of said boat, ROCKY B., at the special instance and request of Charleston Marine Works, Inc. or at the special instance and request of Johnny O. Brown.

VII

Plaintiff has not been paid for the reasonable value of said building

materials, supplies or other items provided for the building, fitting, furnishing and equipping of said boat, ROCKY B.

VIII

Said building materials, supplies and other items provided for the building, fitting, furnishing and equipping of the ROCKY B. are reasonably worth the sum of Five Thousand Four Hundred Ten and 04/100 Dollars ($5,410.04). After deducting all credits and offsets, there is now past due, owing and unpaid to Plaintiff the sum of Five Thousand Four Hundred Ten and 04/100 Dollars ($5,410.04) for the building fitting, furnishing and equipping of said boat, ROCKY B.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. In the sum of Five Thousand Four Hundred Ten and 04/100 Dollars ($5,410.04), together with interest thereon at the rate

of nine percent (9%) per annum from May 6, 1980 until paid.

2. For Plaintiff's costs and disbursements incurred herein.

3. For such other and further relief as to the Court may seem proper.

. . . .

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF COOS

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation, Plaintiff, vs. ROCKY B., a boat newly constructed in the State of Oregon, Defendant.	Case No. 80-1545 ORDER FOR WARRANT FOR SEIZURE OF BOAT OR VESSEL

THIS MATTER having come before the Court upon the motion of the above named Plaintiff and it appearing from the records of the Court that Plaintiff, pursuant to ORS Chapter 783, is entitled to a warrant for seizure of boat or vessel.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Upon the Plaintiff filing a bond in the sum of $10,000 indemnifying the Sheriff against wrongful seizure of said

boat, the Clerk of the Circuit Court of Coos County shall issue a warrant for seizure of boat or vessel pursuant to ORS 783.050 commanding the Sheriff to seize the boat, ROCKY B., Defendant in the above entitled action.

2. Upon issuance of said warrant for seizure of boat or vessel, the Sheriff of Coos County shall, pursuant to said warrant, seize the boat, ROCKY B., Defendant in the above entitled matter, with her tackle, apparel and furniture and retain the same until discharged from such custody by due course of law.

DATED this 5th day of August, 1980.

/s/ James A. Norman
CIRCUIT JUDGE

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF COOS

NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation, Plaintiff, vs. ROCKY B., a boat newly constructed in the State of Oregon, Defendant.	Case No. 80-1545 WARRANT FOR SEIZURE OF BOAT OR VESSEL

TO: SHERIFF OF COOS COUNTY, GREETINGS:

WHEREAS, on the 1st day of August, 1980, Plaintiff in the above entitled action filed a duly verified complaint against the above named boat in the Circuit Court of the State of Oregon for the County of Coos, which complaint alleges amounts due to Plaintiff under an implied contract to perform labor and furnish materials in the construction, furnishing, fitting and

equipping of the above said boat, ROCKY B., and

WHEREAS, upon the filing of such complaint the Clerk of the Circuit Court pursuant to ORS 783.050 shall issue a warrant thereon commanding the sheriff to seize the boat or vessel named as Defendant in such complaint.

NOW, THEREFORE, IN THE NAME OF THE STATE OF OREGON, you are hereby commanded to seize the above said boat, ROCKY B., with her tackle, apparel and furniture, and retain the same until discharged from such custody by due course of law.

WITNESS my hand and seal of the above said Court on this 6th day of August, 1980.

CIRCUIT COURT CLERK OF
COOS COUNTY, OREGON

/s/ G Blair
Deputy

APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

ROCKY B. FISHERIES, INC. an Oregon corporation; JOHNNY O. BROWN and DAVID BROWN, Plaintiffs,	No. A8110-06552
v.	COMPLAINT
NORTH BEND FABRICATION & MACHINE, INC., an Oregon corporation; JOHN DUDREY with his law firm partners, FLOYD A. FREDRICKSON, LLOYD W. WEISENSEE, PETER C. MCCORD and JAY M. FOUNTAIN; LAWRENCE F. FINNERAN with his law firm partners JERRY O. LESAN and KIRK JOHANSEN, Defendants.	ACTION AT LAW; DAMAGES; WRONGFUL SEIZURE OF PROPERTY; VIOLATION OF CIVIL RIGHTS; MALICIOUS ABUSE OF PROCESS; INTERFERENCE WITH CONTRACTUAL RELATIONS. DEMAND FOR TRIAL BY JURY

Plaintiffs allege:

FIRST CLAIM FOR RELIEF

(WRONGFUL SEIZURE)

I

At all times material hereto, plaintiff Rocky B. Fisheries, Inc. and defendant North Bend Fabrication and

Machine, Inc. were and are Oregon corporations in good standing.

II

Prior to January 10, 1980, plaintiffs Johnny Brown and David Brown had constructed and owned a fishing boat named "Rocky B." Said boat was launched January 10, 1980. During December, 1979, ownership of "Rocky B" was transferred by Johnny Brown and David Brown to plaintiff Rocky B. Fisheries, Inc., a corporation owned by Johnny and David Brown. "Rocky B" is a documented vessel pursuant to the laws of the United States, and was and is subject to a Preferred Ships Mortgage in favor of the Southern Oregon Production Credit Association, a corporation (hereinafter PCA).

III

During the construction of the "Rocky B", defendant North Bend

Fabrication and Machine, Inc. performed services and supplied materials for said boat, and incurred charges which were paid. After January, 1980, defendant North Bend Fabrication and Machine, Inc. performed additional services and supplied additional material for "Rocky B" and claimed charges in the sum of $5,410.04 as of May 6, 1980.

IV

At all times material hereto, the "Rocky B" had a fair market value of approximately $600,000.

V

At all times material hereto, plaintiffs Johnny Brown and David Brown were employees, officers and directors of plaintiff Rocky B Fisheries, Inc., whose principal asset was the "Rocky B" and their source of income and livlihood [sic] was earned and dependent on the "Rocky B" being used in the fishing industry.

VI

On August 5, 1980, defendants acquired, without notice of any kind to plaintiffs, an order for seizure of the "Rocky B" issued by the Circuit Court, State of Oregon, for the County of Coos. (Exhibit A attached hereto and incorporated by reference herein.) A warrant for seizure of the "Rocky B" was entered by the court clerk on August 6, 1980. (Exhibit B attached hereto and incorporated by reference herein). On or about August 6, 1980, the "Rocky B" was seized and arrested by the Sheriff of Coos County, Oregon.

VII

The seizure of the "Rocky B" was effected by defendant North Bend fabrication and Machine, Inc., acting through and in concert with its attorneys, defendant Lawrence F. Finneran of the law partnership consisting of defendants Jerry O. Lesan and Kirk Johansen, and

defendant John Dudrey of the law partnership consisting of defendants Floyd A. Fredrickson, Lloyd W. Weisensee, Peter C. McCord and Jay M. Fountain. Each of the said attorneys in these law partnerships are responsible for the acts of defendants Lawrence F. Finneran and John Dudrey as alleged herein, which acts were performed within the course and scope of their employment as attorneys for defendant North Bend Fabrication and Machine, Inc., and their employment by or partnership in the said law partnerships.

VIII

Immediately after the seizure of the "Rocky B", plaintiffs requested release of the "Rocky B" by defendants, which request was refused.

IX

Solely as a result of the seizure of the "Rocky B" by defendants, PCA was

forced to file a complaint for foreclosure of its mortgage on the "Rocky B" in the United States District Court for the District of Oregon (Civil No. 80-6300-c) in order to protect its interests. PCA caused the United States District Court to order seizure of the "Rocky B" by the United States Marshal, and the "Rocky B" remains at this time under seizure.

X

. . . .

XI

As a direct and proximate result of the wrongful acts of defendants, plaintiffs have been damaged in the sum of $1,000,000.

XII

The wrongful acts of defendants were wanton, grossly negligent, and reckless, and therefore punitive damages should be assessed against defendants in the sum of $1,000,000.

SECOND CLAIM

(VIOLATION OF CIVIL RIGHTS)

XIII

Plaintiffs reallege paragraphs I through IX, inclusive, and XI and XII of their FIRST CLAIM FOR RELIEF, as if fully set forth herein.

XIV

The seizure of the "Rocky B" was effected by the defendants, acting in concert under color of state law, in violation of plaintiffs' constitutional rights as guaranteed by the Constitution of the United States, and the Constitution and Laws of the State of Oregon, in that:

a. No notice was provided to plaintiffs.

b. No affidavit of probable cause was submitted to the Court;

c. No opportunity for a judicial hearing was afforded plaintiffs;

d. No adequate bond was posted to protect plaintiffs from wrongful seizure;

e. No opportunity was presented to plaintiffs to present affidavits of evidence to the court; and

f. No facts were presented to the court (and none existed) that the "Rocky B" was in danger of destruction, harm, concealment or transfer.

XV

Defendants alleged that the seizure was effected pursuant to Oregon statutes, ORS Chapter 783, which statutes were unconstitutional on their face, and were unconstitutional as applied to the seizure of the "Rocky B", as had already been clearly established by judicial decisions of the United States, the State of Oregon, and Oregon statutes.

XVI

Plaintiffs are entitled to recover their reasonable attorneys fees herein.

. . . .

WHEREFORE, plaintiffs pray for judgment against defendants and each of them:

. . . .

(2) On their Second Claim for damages in the sum of $1,000,000, punitive damages in the sum of $1,000,000, and for reasonable attorney fees incurred herein.

. . . .